IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 625.

ELOISA L. BERGERE, for herself and the other heirs of MANUEL ANTONIO OTERO and MIGUEL ANTONIO OTERO, Appellant,

vs.

THE UNITED STATES.

No. 658.

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vs.

ELOISA L. BERGERE, for herself and the other heirs of MANUEL ANTONIO OTERO and MIGUEL ANTONIO OTERO.

Statement and Brief of Argument in Behalf of Eloisa L. Bergere and other Claimants.

These cases are appeals from the decree of the Court of Private Land Claims made at Santa Fe, New Mexico, Sept. 29th, 1894, in a proceeding wherein the claimants were petitioners for the confirmation of a certain grant of land situate in Bernallio County in said Territory, which proceeding was in pursuance of Act of Congress, approved March 3, 1891, and entitled An Act to establish a Court of Private Land Claims for the settlement of private land claims in certain States and Territories.

The first appeal is from the decree of the Court that, as matter of law the grant to Bartolome Baca was imperfect at the time of the cession of the department of New Mexico to the United States, and that claimant was entitled to only a confirmation of eleven square leagues within the boundaries of the tract called Torreon.

The cross-appeal is by the United States from the said decree as being contrary to law in confirming the claim for any portion of the grant.

Bartolome Baca, through whom claimants deraign title, on Feb. 4, 1819, petitioned the acting Governor of New Mexico for a grant of vacant land, which they call the Torreon, in order to establish thereon a permanent hacienda.

On July 2, 1819, the Governor acceded to the prayer of the petitioner and directed Jose Garcia de la Mora to give possession, "designating the limits and what is proper and to "transmit the espediente to this superior office, so that if ap- "proved, the proper testimonio may be given."

In pursuance of this commission the officer placed the said Baca in possession of the tract by going with him and his companions on the tract and with all the forms of a legal investiture, installing him in possession. In further fulfilment of the Governor's commands the officer designated "to him his boundaries" which are well known natural land marks that are as plain to be seen to day as when in 1819 Baca and his companions in grateful acknowledgment of a kings bounty shouted "long live Don Fernando VII."

The report of the Commissioner concludes, "Wherefore, "I transmit this to the superior authority in order that it "being examined by you, you may decide as you deem best."

At the left hand corner of this document appear the words "los limitos por" and beneath it "elgares" the M having suffered abraision—but enough of the letter remaining to show by comparison with the former signature that it is undoubtedly the genuine signature of the Governor.

The translation of this document in the transcript has the word "torn" before "los limitos" as well as after those words, but it might with greater propriety have said *worn* inasmuch as the defect occurs on the line of the outside fold of the paper, which was most exposed to injury from wear, and the defect itself unmistakably proves that it was occasioned by abraision and not from tearing either intentional or accidental.

Both signatures of the Governor are genuine.

The Surveyor General at the time he made his decision when the grant was first presented for his action, said "the signature of Melgares agrees with his signature upon other documents among the old Spanish archives, and they are believed to be genuine." Mr. Tipton, long employed by the Government in the office of the Surveyor General, and conceded at the trial to be a competent expert witness testified to the genuiness of both signatures, and indeed, no question has ever been made as to their authenticity.

Not only, therefore is the grant unquestioned so far as the paper evidence of it is concerned, but it is a part of the uncontradicted evidence in the case that the grantee took possession in September, 1819, when juridical possession was given and remained in such possession until the date of his death in 1835; and so open and notorious was his possession, that the tract called "Torreon" was known generally as the Bartolome Baca Grant, the old name of Torreon having

lapsed or been confined to the actual "block house" erected by Baca, and the owners name applied to the tract granted.

Furthermore, Baca's possession was actively maintained during his life, and his claim of ownership was evidenced by his erecting the block house; his constructing acequias for irrigation, the maintenance of large herds of cattle and horses and sheep in different bands, aggregating at least 50,000 head, together with swine, and the establishment of permanent ranches with buildings for the accommodation of his herders and ranchmen. His sons remained at the ranches attending to his large interests. He had manifestly carried out to the letter, all that he had engaged to do—as well as what he expected to be able to do—as stated in his petition. It is also in evidence that he invited families to go and live at the Torreon, on account of the protection their presence there would afford against the Indians, Record, p. 71. And this was the beginning of the town that is now there.

To account for the largeness of the grant, the above brief recital would show that Baca was a man eminently qualified to benefit his Sovereign by aiding in the settlement of the country, and his merits and influence are set out officially in the return of De La Mora to the commission given him to place Baca in possession. For he says,

> "Bartolome Baca, captain of volunteer militia, had "merited, by his conduct in the service of both Majes- "ties as proved by the offices that had been conferred "upon him, being Alcalde Major and in other services "in the field; the Governors always appointing him "Commander in the campaigns and scouting parties;

"and in addition to all this, he had always surpassed "others in voluntary contributions, &c."

He was also the first Governor under Mexican rule. Upon his death, and the death of his wife, which occurred in the same year, his papers came to the possession of a son-in-law, who lived with him and who acted as administrator, and upon his death *his* son Bartolome Baca y Chavez, a witness produced, appears to have inherited as an heirloom the strong box of his grand-father containing papers that had belonged to him.

Among these papers was discovered in about 1878 the document that is the foundation of this claim.

In Sept., 1878, the grant was filed with the Surveyor General in pursuance of Act of Congress, July 22, 1854, and after protracted hearings, the then Surveyor General filed his opinion declining to recommend the grant for confirmation.

It does not appear that any paper relating to the grant was found among the Spanish archives that were transferred to the office of the Surveyor General. So that the document produced by the claimants, obtained as hereinbefore stated from the direct descendants of the original grantee is the only evidence *in writing* of the grant having been made.

But the absence from the records or archives of the Spanish and Mexican land office, of a paper that should be found there, can justly suggest only inquiry but not excite suspicion. For it was so often proven in the Court below that those archives had been rifled and mutilated that to avoid constant repetition the agreement found on page 101 of transcript was entered into.

But the document produced directs the Commissioner to return an account of his action to the Governor, that if approved a testimonio may be given to the grantee. Under the practice as proven, the testimonio sometimes, if not invariably, consisted of the original papers, a copy or at best a duplicate original being retained in the office—so that in exact accordance with this practice there is here produced the testimonio that was directed to be given to the grantee if the grant was approved—and fortunately it is an original paper, not a copy.

We have therefore produced the very paper which the law and practice then in force prescribed that the grantee should have. It is shown that possession was given at the time of the date of the document, and that it continued during the life of the grantee at—least sixteen years and that the grantee's descendants with more or less constancy occupied parts of the grant, but always claiming that they were the owners through a grant made to their ancestor, (though from the absence of the paper title they were unable until the discovery of the documents to demonstrate their ownership,) and since the disposal of their interests, their grantees have maintained the possession—the whole constituting a continuous title by positive grant and by continuous and uninterrupted occupation under that title for a period of seventy years, and in addition thereto it is proven beyond contradiction that whatever conditions were attached to the grant, if any, were fully satisfied during the life of the grantee—at least fourteen years before the territory of New Mexico was ceded to the United States. So that it is contended that this was a complete and perfect grant at the time when the United States obtained the sovereignty of the territory.

ARGUMENT.

First Point.

The Governor of New Mexico had power to make grants of land in 1819.

To cite with particularity and exactness all the provisions of Spanish law relating to the disposition of land belonging to the Crown of Spain in New Mexico would be about as "tedious and unprofitable" as were similar attempts in relation to land grants in Florida and Louisiana. Nor has the lapse of more than a half century increased facility of making investigations in a field that appears to have been most diligently worked by learned counsel in the Florida, Louisiana and California cases: For no discovery has been made since the date of those cases that adds a particle of new information or alters in any particular the Spanish law in relation to land grants as laid down by this Court in the early decisions.

The Royal Regulations of 1754 (2 *White, p.* 62) remain as the initial point in the inquiry: for that law in terms abrogates all former rules on the subject, as being vexatious to his Majesty's subjects and unprofitable to the King's fiscal interests. It was intended and was a general scheme for Crown lands in the New World and by its twelfth section was manifestly, made applicable to all the Crown lands in the newly discovered country. Subsequently in certain provinces, as emergencies arose by increase of population or other causes, new provisions were made. Intendancies were created and the Governor's powers were restricted. Such was the regulation of 1768 (1 *White*, 336). But whether New Mexico was attached to one of the Intendan-

cies or not, it is historically ascertained that its Governor was not subject to the Vice-roy, but oppointed and commissioned by the King (*Bancroft's New Mexico*, 256). Again in 1798 (2 *White*, 478) the power was revested in the Intendants. It may be asserted without serious opposition that from 1754 until 1786 the power to make grants remained with Governors and by the latter Cedula that power was transferred to the Intendants. But New Mexico was not named as within the jurisdiction of either of the twelve Intendancies, and so it still remained under the general law of 1754—especially as the law of 1754 is referred to as still in existence—and evidently was to be the rule of action in all cases not specially provided for. Such was the interpretation given to this very law of 1798, in *U. S. vs. Clarke*, 8 Peters 451, where it was held to not apply to East Florida, because it was not specially named, and consequently the power to make grants remained with Governor of East Florida.

Again, in 1812, a new arrangement was made, but this was abrogated in 1814 (2nd White 155) *U. S. vs. Delespine*, 15 Peters 324.

The regulations of 1815 and 1816 (2 White 174)—(2 White 179)—appeared to have relation to the general offices in Spain, and did not affect the power of local authorities in the New World. Again, in 1813 and 1814 new regulations were introduced, but the law of 1754 was referred to as still existing (2 White 264).

Mr. Hall states (Mexican Law, p. 76) that by Cedula of 1818, all business pertaining to the public lands of New Spain should belong to the office of the treasury at Madrid. He pertinently adds, that the law of 1754 did not appear to be repealed. As this law of 1818 is not stated in full by

Mr. Hall it was considered of such overwhelming importance, that for the trial of this case, the learned counsel for the Government procured through the American Minister at Madrid an exact copy.

It disclosed only a change in the accounting department in Spain, but did not affect in any manner the law for the local disposition of lands. So, it may be left without further elaboration that the law of 1754 was the source of authority for the Governor of New Mexico to make a land grant in 1819.

If the question of the Governor's powers in relation to granting land was a new one, its discussion might still excite historic interest; but the point has been so often raised in the Florida and California cases, it is submitted that reference to some of the Supreme Court decisions ought to be sufficient to put at rest every dispute about the power of the Governor in New Mexico in 1819 to make grants for public lands.

In *Clark vs. U. S.*, 8 Peters 451, the Court says:

> "The inconvenience arising from this regulation "(1735) was so seriously felt that the ordinance was "repealed in 1754, and the whole power of confirming "as well as originating titles was transferred to officials "in the colony." "In the distant provinces of the au- "dencias or where sea intervenes (citing the exact "language of the 12th section of the Royal Regulations "of 1754) confirmation shall be issued by their Governor "with advice of the King's fiscal ministers and of the "Lieutenant General where he may be stationed."

In *Delassus vs. U. S.* 9 Peters 134, the Court says:

"A grant or concession made by that officer who "is by law authorized to make it, carries with it *prima* "*facie* evidence that it is within his powers. No ex- "cess of them or departure from them is to be presumed. "He violates his duty by such excess and is responsible "for it. He who alleges that an officer entrusted with "an important duty has violated his instructions must "show it." "This subject was fully discussed in *U. S.* "*vs. Arrendondo* 6 Peters 691, *Percheman vs. U. S.* 7 "Peters 51, and *U. S. vs. Clarke* 8 Peters 436. It is "unnecessary to repeat the arguments contained in "opinions given by the Court in those cases."

But notwithstanding this definitive statement, the question was again mooted in *Strothers vs. Lucas* 12 Peters 438, wherein the Court says: "No principle can be better estab- "lished by this Court than that the acts of an officer to whom "a public duty is assigned by his King, within the sphere of "that duty are *prima facie*, taken to be within his power." After enumerating instances and enlarging on this principle the Court further says: "Where the act done is contrary to the "written order of the King, produced at trial, without any "explanation, it shall be presumed that the power has not "been exceeded; that the act was done on the motive set out "therein and according to some order known to the King "and his officers though not to his subjects." Citing *Minor vs. Tillotson* 7 Peters 96 and 8 Peters 447-456.

Again in the *U. S. vs. Peralta*, 19 Howard 680, the Court says:

"We have frequently decided that the public acts "of officers purporting to be exercised in an official ca-

"pacity and by public authority, shall not be presumed "to be usurped, but that a legitimate authority had "been previously given or subsequently ratified."

And then the Court deduces as a corollary the following:

"The presumption arising from the grant itself "makes it *prima facie* evidence of the powers of the "officers making it and throws the burden of proof on "the party denying it."

All these authorities relate exclusively to grants made by officers acting under the *Spanish Crown*. It was only since 1824 that an entire departure was made and that it has been held that the power of officers under *Mexican rule* for making grants of the public land must be looked for, in the written law, and that the exercise of any power not therein specially authorized is invalid. The difference in decision resulted from the difference between the absolute power of the King of Spain and the constitutional restriction of powers under the Mexican Republic. *U. S. vs. Cambustion*, 20 Howard, 59-65.

It is shown that the regulations of 1754 especially authorized the Governors of Provinces therein described as "remote and beyond seas," (which clearly applies to New Mexico), to make confirmations and hence grants. Besides this the uninterrupted custom as evidenced by the archives in the Surveyor General's Office of grants made by Governors in New Mexico, confirms the opinion that the power exercised in this case is lawful one. It is also stipulated in this case (see Record, page 101) that Gov. Melgares made a grant on April 20th, 1819, to Antonio Ortiz which was confirmed by Congress, also two grants to Pedro Armenda-

riz, both of which have been confirmed by Congress; also the Anton Chico grant to Salvador Tapia confirmed by Congress; also the grant "Our Lady of Light," confirmed by Congress. There have been confirmed by the Private Land Claim Court at Santa Fe a grant by the same Governor to Carlos Gabaldon, also the grant called Canon de Carnue, confirmed by the said court as well as four other grants now pending in said court.

The law of 1754—the decisions of the Supreme Court of the United States—the open and notorious exercise of the power of making grants by Governors and the recognition of that power by congressional confirmation, as well as by the Court specially vested with jurisdiction, oûght to leave no doubt as to the power of Melgares as Governor of New Mexico to make this grant to Bartolome Baca.

Second Point.

Was there a grant made to Bartolome Baca?

That there was such a grant is proved by the production of the testimonio—or grant itself.

The petition, the Governor's provisional grant, the return of the proper officer commissioned to give juridical possession, and the signature of the Governor (as we contend) in approval, all original papers, evidence beyond a doubt that the grant was made.

If it should be contended that the torn part of the document and some missing words leave the approval unestablished, we reply that enough of the signature remains to show beyond a doubt that the grant was finally approved. Because the grant was not like an act of congress, that became a law unless the veto was affixed to it before the ex-

piration of the limitation. There was no grant at all until the final signature was affixed, the initial concession being only provisional and preliminary, including a direction to the executive officer to report the existence or non-existence of certain essential conditions and to fix boundaries. If this report did not satisfy the Governor of the propriety of confirming the previous concession he simply witheld further action, his signature being unnecessary. It is confidently asserted that in the whole history of grants in Florida, Louisiana and California, as well as in Colorado, Arizona and New Mexico, not a single instance can be adduced in which the signature of the Governor was ever attached to a paper in disapproval of a grant. The same history further proves that there was no place or record in the archive office for the preservation of disapprovals. If the grant was not finally approved, that simply ended the whole matter, and there was no record—no testimonio—no evidence of any kind that application had been made or any action ever taken.

It is therefore claimed that the fact of the grantee being possessed of the testimonio is demonstrative proof that the grant was finally approved, otherwise the grantee could not have been in possession of the testimonio.

It might be further contended that the missing words leave room for suspicion that the approval, at best, must have been a qualified one and not a full approval. If conjecture must be resorted to, as to what the missing words were, the most reasonable one is that the missing words (and the space in which they were written clearly indicates that there could not have been more than two) were in reference to the boundaries given by the executive officer, and might

and most probably were "Approved for the limits designated," or words to like effect.

The possession taken and held, of the whole grant, by the grantee under claim of title, is a contemporaneous confirmation of this view as to what the missing words were.

It is further contended by the Government that there being found no corresponding record in the Spanish archives the papers are not evidence. We contend that the documents in possession of the grantee being not simply copies, but original, are the highest evidence, and that having these, it matters not if the archives contain no corresponding paper. There appears to have been no regular method in the office of the Governors for keeping grant papers. In some instances the grants were given to the people, the grant itself, that is to say the grant papers, were recorded in books; at other times the original grant papers appear to have been kept by the Governor and certified copies given to the grantee. Prior to 1713 many grants were given out, of which no copies were kept, so that the practice appears always to have been irregular; and in such a state of affairs no general rule can be applied to the case in hand. (Testimony of Mr. Keys, Record p. 51.)

It is conceded that in many cases the only record of the grant existing, now is in the Surveyors Generals office, and are such papers as have been filed therein by parties in interest since the creation of the office (Record p. 53) and in addition to this it has been so often proven in cases in the land Court of the removal and destruction of the Spanish and Mexican archives, that to avoid repetion of proofs, the stipulation was entered into on Page 101 of the Record. Therefore as to there being no record in the office at Sante Fe

and by its absence concluding that there was no such grant, the case of the *U. S. vs. Wiggins*, 14 Peters 348 is in point. The court says

> "Furthermore, the presumption that the original me-
> "morial and concession supposed to have been on file
> "in the Government Secretary's office have been lost, or
> "destroyed is very strong. After the papers were taken
> "possession of in 1831 by the authorities of the United
> "States they were almost abandoned in an open house,
> "subject to the inspection and depredation of every one;
> "many of the files were seen untied and the papers
> "scattered about the room; the doors and the windows
> "of the house being open there is no doubt that some
> "of the papers were lost."

It is conceded in this case by stipulation (See Record p. 101) not as in the Wiggins case that the room containing the papers was left open etc., but that prior to annexation the Spanish archives containing documents and grant papers pertaining to land grants in New Mexico were in fact partially destroyed and carried away by Revolutionists in 1837 and that in 1870 or 1871 all the papers in the old Spanish archives which had not been turned over to the Surveyors Generals office and in which there were many documents relating to land grants were sold to the people generally for waste paper and carried away and many of them never recovered thereafter.

Taking into consideration therefore the irregular method that obtained in the Spanish Governor's office in preserving and in giving out grant papers, as well as in making records of them and this, coupled with the positive facts so notoriously known and stipulated for as stated above, the absence

of any record of this grant or of any copy of it in New Mexican archives can excite no suspicion but on the contrary corresponds with expectations. It would have been a wonder if any paper relating to a grant to Bartolome Baca who had been prominent all his life as an official under Spanish rule, had been left by the Revolution among the archives where it could be supposed to be a benefit to him.

The decisions of the *United States vs. Teschmaker*, 22 Howard, 392, and *U. S. vs. Pico*, 22 Howard, 406, rejecting original grant papers are not parallel cases; for the reason that the grants were made so late as 1839 under the Mexican law of 1824, and in those cases there was a complete set of records preserved in the proper office where there had been no spoliation. Furthermore, grave suspicions were raised that the grants had been antedated, and were in fact fraudulent.

In the Court below it was hinted at rather than openly stated, that as Bartolome Baca, subsequent to the grant to him, himself became Governor of New Mexico, he had the opportunity of proloining from the archives the original documents produced in this case. Such an imputation was an ungracious reflection upon the reputation of a man who had been a trusted officer of his Sovereign, and was evidently held in the highest esteem in his community. But the supposition that he came into possession of these papers in a clandestine and furtive manner, at least pre-supposes that the document was among the records.

In addition, however, to the production of the grant papers we have the undoubted evidence of living witnesses to the fact of juridical possession having been given to Baca

of the very land described by metes and bounds in the grant. See testimony of Jesus Saavedra, page 65, Record, and Miguel Lucero, page 68, Record.

Besides the evidence of the *taking* possession of the grant at the date mentioned in the documents, the testimony of others, of his continuous possession from 1819 up to the date of his death 1835 under claim of title under this very grant, constitues a chain of title both documentary and possessory that seems irresistible.

Third Point.

What was the nature of the grant—in fee—for the usufruct—complete or with conditions subsequent?

We content that with the title was in fee.

> "Because the petition asks that you (the Governor) "be pleased to grant the same in *real possession* in the "exercise of the powers conferred upon you by his "Majesty in order to establish thereon a *permanent ha-* "*cienda*, which he engages to occupy with his stock, "sustaining the same with armed servants who may "defend it against the incursions of the enemy with- "out abandoning it; and, if possible, to open lands for "cultivation whether irrigable or dependant upon the "seasons for the advancement of agriculture, and al- "though the water sources it contains are small and "uncertain, he proposes to improve them with reser- "voirs and other appliances which will secure every "advantage possible.

The words "real possession," "permanent hacienda," "opening lands for cultivation," "improvement by reservoirs and other appliances," together with the whole tenor

of the petition, are words and language utterly inconsistent with the temporary use of the land and can only refer to a title in fee.

The Governor's preliminary order contemplates in like manner a fee; for "no injurious results to third persons," "but on the contrary increase to agriculture and stock raising under the conditions asked," refer to permanent improvements. For the ploughing of virgin soil and otherwise adapting new land to agriculture implies an expenditure that no man in those days or even in our own upon the better public lands of the U. S. would ever undertake to make for simply the temporary use of the land. The Governor directs possession to be given and return to be made to his office so that if approved the proper testimonio may be given. If it is a mere temporary *usufruct*, why the formality of a return and a testimonto to be given? Moreover it is more than doubtful whether the Spanish law ever authorized any formal grant of lands for temporary use.

U. S vs. Huertas, 8 Peters 475, confirmed a "cattle raising" grant, where there were express restrictions against alienation.

In this case Mr. Call submitted to the Court (printed as an appendix to the volume containing a report of the case) an argument that is perhaps the most exhaustive and well considered of any reported, against the confirmation of the grant, upon the very ground that it was a grant for grazing and in terms did not contemplate a fee, but was only for the *usufruct*; yet this Court confirmed the decree of the Court below, holding the grant to be good and valid.

The return of the Alcalde giving possession, is in line with the idea of a title in fee, for after designating lim-

its he says, "and the gentleman being satisfied and grateful to the Governor, etc., binding himself to increase by his intelligence the limited waters which had been donated to him in order that his herds may be maintained, to which he is bound," etc.

It is submitted that it is a proper deduction from all the authorities that where the grantee is to make permanent improvements of any kind that would benefit the land or tend to induce its settlement, the title given is a fee, not a *usufruct*—subject only to the condition of making the designated improvements.

U. S. vs. Sibbald, 10 Peters 322.

In *U. S. vs. Richard*, 8 Peters 473 the question was raised, whether the grant was of the land or for the timber growing on it, the condition being the erection of a saw mill. The "Court says:" The grant of the tract which depends "on building a mill was obviously supposed to pass some-"thing more than was passed by the permission to cut tim-"ber until it should have effect.—"The Judge of the Supe-"rior Court construed the concession to be a grant of the "land and we concur with him in this construction."

In the Baca grant the words "tract" and "wild land" appear as did the word "tract" in the Richard case upon which the Court laid stress.

In the following cases the language of the grant was not broader than the one now under discussion and yet no question was made but that in such case the fee was intended to be granted; and the same cases hinge likewise upon the performance of the conditions. In one of those cases counsel has classified the grants made in such a clear manner that his classification is herein presented.

Grants appear to be of three kinds.

1. Absolute grants in consideration of services already performed.

2. Grants in consideration of services to be performed, and deemed especially important for the improvement of the province. The services appear to be of three kinds; the erection of saw mills, factories or mechanical works. The introduction and raising of large numbers of cattle and the establishment of large bodies of settlers. The titles of these are in some *instances absolute on their face and convey a present grant from their date, though coupled with conditions for the subsequent performance of the specified services;* or they were concessions or incipient grants securing a future absolute title on performance of conditions. Absolute titles in first instance are cases of *U. S. vs. Arredondo*, 6 Peters 745 and *U. S. vs. Clarke*, 8 Peters 441.

3. Grants of small quantities of land for purposes of actual cultivation and occupation.

The Baca grant clearly belongs to the second class and to the subdivision "absolute grants with conditions subsequent." Other cases confirming this classification are as follows:

U. S. vs. Wiggins, 14 Peters, 340.
Case of Sequi, 10 Peters, 306.
Seton's Case, 9 Peters, 311.
Sibbald's Case, 9 Peters, 313.
U. S. vs. Mills, 12 Peters, 215.
U. S. vs. Kinsley, 12 Peters, 477.

All these cases affirm the doctrine that the performance of conditions, (and in some instances the conditions were not fully performed owing to insuperable impediments) makes the titles indefeasible.

In the *U. S. vs. Clarke*, 9 Peters, 170, Marshall, C. J., said:

"A concession on condition becomes absolute when the condition is performed."

The conditions of this grant were according to the petition "To establish thereon a *permanent hacienda* which he engages to occupy with his stock, sustaining the same with armed servants, who may defend them against the enemy without abandoning it; and he will also, if possible, open lands for cultivation, whether irrigable or dependant on the seasons, for the advancement of agriculture, and that he would improve the small and uncertain waters with reservoirs and other appliances. In the act of juridical possession the condition is expressed in these words, "binding himself to increase by his intelligence the limited waters which have been donated him in order that his herds may be maintained, to which he is bound."

The testimony of Barto. Chaves, y Baca, Record, p. 26: "I went there (Torreon) a good many times after Baca died. Thirty families were living there. There was one very long ditch about four miles. There were two laterals. They irrigated gardens with it and little pieces of land, amount of land cultivated about a mile long and a little less of width. They were old ditches." To the same effect is the testimony of Jose Antonio Padilla. Pages 38, 39, 40 Record, Miguel Lucero, P. 68, Clemente Chaves, P. 74, Record, Matias Sanches, Page 76. Other testimony, *passim*, shows conclusively and without contradiction not only the waters "improved" by the construction of Acequias and the cultivation of land, but also that Baca erected a block-house at Torreon, that he established houses and

headquarters for his ranchmen, and that his herds, consisting of sheep in different bands aggegating from fifty to seventy thousand head, together with horses and horned cattle, under the charge of herders, were in full possession of the grant from 1819 until his death.

The Court below finds the fact to be that the tract called Torreon (which meant the entire grant and not simply the particular place afterwards called Torreon, because of the erection of the block-house there), had been in the actual possession of Baca for more than four years from the date of the grant on September 12, 1819.

"The four years are mentioned presumably upon the theory that it must have been occupied at least that length of time in order to comply with the law (*2 White* p. 49), and this law expressly says that the settlers "from the expiration of said term are hereby empowered to sell the same and freely to dispose of them at their will as their own property." (*2 White* 283). It must further be said that this finding of fact by the Court below implies that Baca had complied with the condition during that time, otherwise they scarcely would have found as matter of law that he was entitled to a confirmation of any part of his title. But whether the time for the performance of the conditions is three months(*2 White*, 51), or four years (2 *White*, 49-283), or ten years (*2 White*, 54), *Mitchel vs. U. S.*, 2 Peters 261, (and in the case of ten years possession even executive action is barred (*2 White, p.* 86) the finding of the Court is that Baca occupied the land for *more* than four years and the evidence that convinced the Court of this occupancy, fully stablishes the fact and compels conviction that there was a

continuous occupation until the day of his death in 1835—a period of 15 years from the date of the grant.

In *U. S. vs. De Morant*, 123 *U. S.* 335. objection was made that no evidence was given of cultivation as required by the grant. The Court says—

> "as to not cultivating the land it was proved very con-
> "clusively on the trial that the grantees actually built
> "houses and resided upon it shortly after the date of
> "the grant. "We cannot hesitate to conclude therefore
> "that these titles were complete within the time required
> "by the act 1860."

But we are not left to conjecture or inference, for as we stated above the testimony everywhere shows that Baca erected his block-house, constructed houses for his employes, began a system of irrigation—one witness testifying that in 1829 the main acequia was about four miles long and that it appeared at that time an old ditch—these improvements together with the great herds maintained and watched and cared for by his employes and sons establish beyond question a most liberal compliance with the terms of all the conditions.

It is also in evidence that in 1822, Record, p. 73, p. 76, p. 42, the Indians were committing depredations and that campaigns were made against them, and "that Baca attended to that."

Some objection was made before the Surveyor General that as Baca never lived upon the grant, therefore he never had possession of it. Such an objection might be made with some force if the grant were a town lot or a small pieee of land where from the nature of it residence would be required, but the grant papers do not furnish grounds for any such,

implication. Furthermore, residence was not required by Spanish law as the same is set forth in 2 White, 84, "Possession is the legal holding or enjoyment of the thing with the intention of excluding others from it;" and again "a civil possession as it is called is when a person goes out of his home with the intention of not relinquishing it and this is as valid as though he were in corporeal possession of it." The giving of juridical possession was the first act and when that was accomplished no further corporeal possession by the owner himself was necessary. He might under the Spanish law as under our own law hold his possession by his agents or tenants, and that was what was done in this case.

It is thus conclusively shown that every condition required by the terms of the grant had been fully and completely complied with by the grantees before 1835—so that in any view of the legal time requirements, he had fully discharged all his obligations.

If this is the case then the grant having been absolute in the first instance, but with conditions subsequent was complete and perfect by performance of conditions before and at the time of grantees' death and his title to the whole tract should have been confirmed by the court. The act of Congress creating the Court of Private Land Claims in section 6 directs a petition to be filed in said Court for confirmation of grants which are not complete and perfect at the date of the passage of the Act.—Section *eight* provides for the presentation of claims that were complete and perfect at the date when the U. S. acquired Sovereignty. And section 13 division 7 refers to claim mentioned in section 6, which are not already complete and perfect at the time of the transfer

of the Sovereignty to the U. S. and limits their confirmation to eleven square leagues.

If then, conditions were performed in 1835 or afterwards, but before Sovereignty was acquired by the U. S., the confirmation should have been for the full amount contained within the boundaries.

Fourth Point.

It is contended by the learned counsel of the Government that in as much as the Eastern boundary designated in his return extends the Eastern boundary beyond the point mentioned in the petition, it was an officious act of the Alcalde and void.

It is decided that if a grant was made within certain boundaries, ascertained by natural objects, such as hills, mountain peaks or other natural objects, the grantee is entitled to all the land within those boundaries.

Higuera's Heirs, 5 Wall, 827.

Now the grant was not finally made until return was made by the Alcalde and approval had. Before that time it had no existence. The confirmation of the Governor was the one act that fixed the right of the grantee, and that final act was based upon the return and, necessarily in this case, in confirmation of that return. It cannot be supposed that the Governor was deceived or that he omitted to notice the discrepancy, if any real one existed, between the description in the petition and that in the return, any more than he would be deceived or failed to notice any other matter that was submitted for his official inspection. Further, the return, extending the Eastern boundary was in no sense an officious intermeddling: for in his commission the officer

was especially ordered to "designate the boundaries." The petition was evidently not intended to specify, except in the general, the land asked for, that was left to the granting power, in-as-much as the executive officer was the most proper person to give in detail the limits of the grant. It was so done.

Furthermore, the act of the executive officer, besides conforming exactly to his instructions, corresponds with what we know must have been the intentions of the petitioner in making his request and of the Governor in granting it. For, although he asks for land "to the Estancia spring," the nature of the country, the value of a water right and the absolnte necessity for such a right for the enjoyment of the land forbids a construction that would extend his concession only *up to* the spring but exclusive of it. And if on examination it was found that the natural overflow from the spring was to the East, the grant to be effective must have included the land that was benefitted by such overflow. Hence, the extension to the Pedernal mountain. The land between where the overflow stopped and the mountain was absolutely useless to anyone for any purpose and the mountain was evidently the natural boundary and so it was fixed as the Eastern limit.

Fifth Point.

Was there a forfeiture?

It was argued by the Surveyor General and his decision appears to be the basis of the Government's contention now, that the grant to Baca was forfeited by the fact that re-grants were made by the succeeding government of portions of Baca's land and that these re-grants were conclusive evidence of a forfeiture.

The whole tenor of the Spanish law is contrary to this proposition. For it was axiomatic "that those things which the King gives to any one cannot be taken away from him by the King or any one else without some fault of his (*2 White, 99*).

Strother vs. Lucas, 12 Peters, 443.

The only instance in which property once given could be reclaimed by the former owner, was in the case of a leasehold where the rent was not paid—which *ipso facto* forfeited the estate—and it is added "without it being necessary to have recourse to the authority of a judge." (*1 White. 86*).

It is undoubtedly the law that before land once granted could be regranted, a proceeding judicial in its nature should be had to declare the forfeiture. This was recognized by *Mitchell vs. U. S.* (9 Peters, 743.)

Arredondo's case, 6 Peters, 737.

The Spanish Government recognized this to be the law that "the estate granted was not afterward liable to be devested except by regular proceedings on denouncement."

Henshaw vs. Bissell, 18 Wallace, 255.

Hornsby vs. U. S., 10 Wallace, 238.

Opinion of Mexican Attorney General cited in Antonio Baca grant. Private land claims, 1874–5, page 81. Executive Doc. No. 62, 43d Congress, 2d Ses. H. R.

Even where it appeared that two complete titles were given for the same land the presumption would be that the junior title issued by mistake rather than the elder title had been forfeited. This is the case in our law and the reason

of it should make it applicable in the Courts of the remedy, to grants under any law.

Fletcher vs. Peck, 6 Cranch, 87.

It is true that in Louisiana it was held in a number of cases that the re-granting of land previously granted *where the second grantee had the possession and had made improvements* conferred, the better title and the first grant was presumed to have been forfeited without a formal denouncement. The possession and improvements of the second grantee are the explanation of the doctrine. From the nature of things the second grantee could not have possession and have made improvements without the land having been vacant, it either never having been occupied or else abandoned by the first grantee. It would be no violent stretch of presumption, therefore, to visit upon an abandonment the penalties of a forfeiture. It is submitted, therefore, that the language of Judge Catron, in his separate and partially dissenting opinion, in *U. S. vs. Reading*, 18 Howard, 16, was predicated upon the fact of an open and notorious abandonment by the first grantee. What he contended against was that a bare grant unsustained by evidence of any performance of conditions could secure the title, and he denied the correctness of the inference that might be drawn from the general language of the court, "that every incipient grant by Mexican authority secured the land to the grantee without the performance of any condition," and afterwards, held the rule to be "that where the Spanish authorities have granted the same land twice, and the younger grantee has *taken possession and performed the conditions of inhabitation and cultivation* he is entitled to hold the land.

The same learned Judge reiterates the same doctrine in his dissenting opinion in *Freemont vs. U. S.*, 17 Howard, 442, citing *U. S. vs. Boisdore*, 11 Howard, 96.

This same doctrine is fully set forth in the judicial opinion of Saavedra, (2 White 289,) as being the law in Florida.

This doctrine, though by a single judge, does not militate against the claimant in this case. For here there is not a particle of evidence that there was ever a relinquishment of claim or an abandonment of possession, but it is almost conceded that there was a continuous possession by the grantee until his death and that he had fulfiled every condition required.

Furthermore, there is no proof submitted that any of the second grantees ever were in possession of any part of the grant or ever made any improvements thereon, temporary or permanent, saving and excepting only the towns to which reference will be made. So that the cases referred to in Louisiana, as well as Judge Catron's opinion, present no analogy to the case in hand.

Moreover this constructive forfeiture, based as it is upon the actual abandonment by the first grantee and occupancy and improvements made by the second grantee can logically be applied to no more land than was actually occupied and improved by the second grantee. There is no authority in any of the cases referred to that would justify the conclusion that the whole grant of Baca had been forfeited because small portions of it had been regranted and (conceded for the purposes of argument) occupied by the second grantee.

As to the towns—Manzano, the land for which was granted in 1829, is now ascertained to be located wholly beyond the southern boundary of the Baca grant.

Tajique was granted in 1834, the year before Baca's death, and the town of Torreon was not granted its land until 1841. It is in evidence that it was at Torreon that Baca first made his improvements by the construction of acequias and the erection of his block-house and Mariano Tores in 1878 testified before the Surveyor General "that "Baca before he died permitted families to go and occupy the "place (Torreon) and it is in this way that there is now a "town there, he inviting the families to go and live there on "account of the protection their presence there would afford "to his interests there against the Indians." If it is positively shown that Torreon was settled in this way by his invitation and in furtherance of his interest, a like inference must be drawn in the case of Tajique, which is in a proximate locality to Torreon. This is strengthened by the fact that Tajique was given its land before the death of Baca, and of course when he was in possession and presumably, therefore, with his consent. In 1841 also, Chilli received a grant. It must be remembered that these dates were only the dates of the grant, and at that time the inhabitants of those towns would most likely have been in possession for a long time previous. As it is positively shown that settlement in different localities on his grant of limited spaces was a part and parcel of Baca's plan of settlement; the conclusion is, therefore, inevitable that he originated the other towns, and that they were all settled, not only with his acquiescence but with his active co-operation. So far, therefore, from these town grants being evidence from which to infer a forfeiture—

they rather strenghten his claim of ownership. The town grants were evidently conceived in the spirit of the Spanish law for the formation of municipalities, through which by a system that was prevalent in New Mexico, individuals could obtain allotments of land.

The bill filed in this case concedes the right of the towns to their town lands, and disclaims all right to the same. This disclaimer assures the titles to the towns with the same effect as if the forfeiture theory had been adopted, but with this difference only, that it saves donations to these towns by Baca from being ungraciously distorted into a forfeiture.

There are two other individual grants that conflict with the Baca grant—first, that to Nerio Antonio Montoya in 1831. It pretends to be made by the territorial deputation and not by the Governor. Under the authority of *U. S. vs. Vigil's Heirs*, 13 Wallace, 449, and *Van Reynegan vs. Bolton*, 5 Otto, 33 (95 U. S., 33), it is null and void for the reason that under the law of 1824 and the regulations of 1828 the territorial deputation had no power to make a grant. Furthermore, it was made in 1831, during the life time of Baca, and whilst he was in the actual possession of the whole tract, and the grant petition studiously avoids stating that the land was vacant, or that its grant would injure any third person, but simply says that it was "uncultivated, and that it would not be injurious to the inhabitants of "this jurisdiction in regard to pasturing and water for their "live stock, owing to the barrenness of the canon in which "this tract lies." In this case there is no evidence that any possession was ever taken or improvements made under this Montoya grant.

The grant to Antonio Sandoval in 1845 is open to quite as many and as fatal objections.

1. It was in compensation for past services rendered the country and was for grazing. The law of 1824 and the regulations of 1828 recognized no such power in the Governor. *U. S. vs. Vallejo 1 Black*, 541.

2. There was no concurrence by the departmental assembly.

Beard vs. Federy, 3 Wall, 478.

3. The grant was for land largely in excess of the quantity allowed by law.

4. It does not appear anywhere in the paper of the grant except in the petition that the land was vacant and unoccupied. *U. S. vs. Workman*, 1 Wall 745.

Moreover there had been made to Sandoval prior to this alleged grant two other grants, The Bosque del Apache and Agua Negra, both confirmed by Congress in 1860, one of 60,117 acres and the other 16,000 acres. The Supreme Court has held that there could not be granted to anyone for his individual use more than eleven square leagues, *U. S. vs. Hartwell*, 22 Howard 286; *Colorado Co. vs. Commr's*, 95 U. S. 264.

Complainants thus having shown a documentary title; a possession practicably continuous since 1819; full compliance with all conditions before the acquisition of New Mexico by the U. S.; and further that no judicial or other proceedings to formally divest the estaste had ever been had, and that the town grants, by every presumption as well as by evidence, are shown to be in subordination to the express desire of the original grantee;—and finally that both of the

grants of Montoya and Sandoval are invalid, the claimants in this case pray the Court, in reversing the decree of the Court below in restricting title to 11 square leagues, to decree that the Bartolme Baca grant, before the date of the acquisition of New Mexico by the United States, was a complete and perfect grant for the land embraced within the established boundries, and thereupon to remand the case for further proceedings conformable to the act of Congress.

T. B. CATRON,
J. D. O'BRYAN,
Solicitors for Claimants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 279.

ELOISA L. BERGERE, for herself and the other heirs of MANUEL ANTONIO OTERO and MIGUEL ANTONIO OTERO, Appellant,

vs.

THE UNITED STATES.

No. 299.

THE UNITED STATES

vs.

ELOISA L. BERGERE, for herself and the other heirs of MANUEL ANTONIO OTERO and MIGUEL ANTONIO OTERO, Appellee.

Argument for Appellant.

The grant was asked for a tract of land called Torreon which the petition said "extends" to certain natural objects mentioned, to *establish thereon a permanent ranch or hacienda*, which the petitioner undertook to occupy with his stock, sustaining the same with armed servants, who may defend it against the incursions of the enemy without abandoning it, "and that he must, *if possible*, he would open lands for cultivation . . . . for

the advancement of agriculture," that he proposed to improve the water sources by reservoirs and other appliances which would secure every advantage possible, and prayed possession with proper documents.

The petition does not say the tract called Torreon extended no further than the natural objects mentioned, or stopped at them; but that it extended to them; it may have and did extend further, as found by the judge who gave the juridical possession. We may say the Potomac river extends to Mt. Vernon on the south and Harper's Ferry on the north, but it does not necessarily stop at either of those points.

The Governor made the grant as follows: *As he asks it according to law*, and I understanding no injury results to any third party, on the contrary, increase of stock raising and agriculture under the conditions asked." The word "granted" is understood as preceding the words "as he asks." To what do the words "under the conditions asked" refer? Certainly not to the grant; that is qualified by the words "according to law;" they can only refer to the fact that under the conditions asked an increase of stock raising and agriculture would be accomplished, and that no one would be injured. After the grant in the first clause, p. 9, the Governor directs by the second clause that "Don Jose Garcia de la Mora will proceed to give possession, *designating limits* and doing what is proper, which being concluded he will transmit the expediente to this superior office, so that if it be approved the proper testimonio may be ordered to be given to the petitioner."

The first clause is the grant and is for the petitioner. The second clause contains the directions and authority to his subordinate, the judge, as to what he should do in the premises. What is the requirement of the second clause? To give possession, *designate limits*, and do what is proper, and to transmit the expediente to the Governor.

If the full limits of the tract of land called Torreon had been correctly designated in the petitition, why say "designating limits?" They would be already designated. This is a construction placed on the natural objects specified in the petition by the Governor, who evidently did not consider the tract of land was *bounded* by these natural objects; he certainly granted the tract, and there could be no reason to go further than to say granted "as he asked it, according to law." "As he asks it" would certainly refer to the description or designation of the land; then the addition of the words "designating limits" shows that the natural objects were not the definite boundaries necessarily, but only served to show in what particular locality the tract would be found.

The judge in giving possession shows how he cousidered the grant. He first shows Melgares was Governor, not Lieutenant Governor as alleged. He says "I have proceeded in his company to examine the *tract* he *applied for* . . . . I have placed him in possession . . . and I designated to him for his boundaries on the south the Ojo del Cuervo following its line to the Ojo del Chico; on the east, the Cerro del Pedernal; on the north the Ojo del Cibolo; on the west, the Altura de la Serra . . . . the said gentleman being satisfied and grateful to the said Governor, &c., ... binding himself to increase by his intelligence the limited waters which have been *donated* to him in order that his herds may be maintained, to which he is bound." (p. 9)

It will be seen they proceeded to examine the "tract he applied for," that he "designated to him for his boundaries" certain natural objects. These differ on the north by using Ojo del Cibolo (Ojo is a spring) instead of Monte del Cibolo stated in the petition. On the east he designated Cerro del Pedernal instead of Estancia Springs, and on the south he designated Ojo del Cuervo, *following its line to the Ojo del Chico*

This latter designation shows why the south boundary on the map is not straight. The Ojo del Cuervo is situate where the line going from west to east bends to the south of east; it so bends to form the line from it to the Ojo del Chico and is correctly designated on the map and leaves Manzano out of it. This was a compliance with the direction of the Governor to designate limits, and as only the *tract* was granted, he must find *its limits* and designate them.

The condition fixed by the Judge (not the Governor in the grant) is that he must increase "by his intelligence the limited waters which have been *donated* to him *in order* that his herds may be maintained"

The proofs are abundant and incontrovertible that Baca took possession at once, built a house and kept his stock there, consisting of many thousand head of sheep, hundreds of horses and cattle; that his sons and servants lived there, and he frequently visited it to look after the same; that acerquias to carry water were constructed, and some land was cultivated. Testimony pp. 23, 27, 36, 39, 40, 41 and 42, 65, 67, 68, 70, 71, 72, 73, 74, 76, 79. There was certainly a continuous occupation by Baca for 16 years from date of the grant until his death, and his wife and grandchildren—children of his sons who had died—occupied it afterwards for many years. The evidence shows it was recognized and respected by all as Baca's property during his lifetime, and after his death, as that of his heirs.

It is claimed that Baca abandoned the property. How? For 16 years, while he lived, he kept his stock there; his sons and servants lived there and one son died there; they had families, and their children lived there afterwards. He built ditches for water, cultivated land, had 75,000 sheep and 300 horses and 900 cattle there. If Indian troubles compelled him to remove his stock, he took them back. When can it be said he abandoned the property?

It is said he does not mention it in his will. But the will does not purport to mention all his property. It mentions property belonging to him, but does not say it is all he had. If it did, still he might have forgotten it, or what is more likely, he may have given it to his sons or children, as it appears by his will that he did not therein enumerate all the sheep, cattle and horses the evidence showed he had on the ranch. The custom of these people was, as they grew old, to divide their property among their children, reserving enough for their own support, and without doubt he did so in this case, giving to his sons the land and most of the live stock of this ranch As his sons occupied the property and held the possession, which is evidence of title, it could much more properly be said the will shows Baca had parted with his title, to them, than that he had abandoned the property. He kept some of his stock, and the evidence shows that after his death it was rounded up on the property and handed over to Baca's widow, who placed another mayor-domo (boss) in charge, p. 68. She was the executrix. As all acquest property belonged equally to the husband and wife, it may be that the ranch and much of the stock was divided by him and given to his wife; certainly his heirs continued to occupy and claim the property after his death in 1835, pp. 30 and 36.

Baca's grandsons lived at Torreon after Nerio Montoya returned. In 1841 they were there. (see p. 36). Clemente Chaves testified, pp. 79 80, that the heirs of Baca, after his death, claimed the property; that after the death of Baca the property was recognized and respected as the property of Baca's heirs, and other evidence showing claim of title and occupation at Torreon.

The proofs show possession of this property for 16 years during Baca's life, and after his death, by his heirs for at least 20 years more. After the grant was made there was a change of

sovereignty, first to an Empire under Yturbide, and then to a Republic. These changes had the same effect on this title as the change when the United States took charge. Baca was in full possession when Spain lost the country and when the Empire and Republic assumed control. Conditions subsequent were no longer required to be performed, if any attached (Fremont's case, 19 How). The decree of the Court of Private Land Claims finds the facts; it is O. K.'d by Reynolds, U. S Attorney, pp. 102 and 103. In the first finding that court say: "That on February 4, 1819, Bartolome Baca presented his petition to the *then Governor* of the Province of New Mexico, Facundo Melgares, setting forth that he had registered a piece of vacant land which was called Torreon; that said Governor *made said grant, as petitioned for* on July 2nd, 1819, and directed Jose Garcia de la Mora to give possession *designating limits* and officiating duly; that afterwards, to wit, September 12, 1819, the said official *gave the said Bartolome actual possession of said tract of land called Torreon*, petitioned for, "thus finding that the possession of the identical tract was *given as prayed for*, and that the *grant* was made as *petitioned for*. These were findings made by a court which heard the evidence, except such as came from the Surveyor General's office, and such court is better qualified to judge than a court of review. The findings of a court or master in a chancery case takes the place of a verdict of a jury.

Where the court obtained its idea that the grant was imperfect, it is hard to guess; it is made without any conditions absolute in terms, except the improvement of the waters sufficient to maintain the stock, which it is shown were for over 16 years maintained there, during the life time of Baca and even after that, and it is also shown that acequias or water ditches were taken out and existing there as old ditches in 1829-30 Can any one doubt that Baca had enough water to maintain his stock?

If he had, the condition was performed He had done more; he took out irrigation ditches for cultivation and cultivated the land; had houses and servants and his sons on the property. No pretense is made that he did not perform the conditions.

It is asserted the grant was to be approved after possession. The order is that the "expediente" be returned so that if "it" be approved the proper testimonio might be given. There can be no doubt that it was returned. The signature of Melgares, the governor, omitting the letter "M," is at the foot under some endorsement claimed in the last brief to be "d los limites por." If the "d" is not an abbreviation of *de*, which it is when used and standing alone, but is the last letter of a word ending in *d*, it was doubtless the last letter of the word "propiedad," meaning property, or of "merced," meaning grant. It might be the endorsement was "apruebo como la merced los limites por el juez designado," meaning I approve as the grant the limits designated by the judge;" or if it was the abbreviation of "*de*," it might be "aprobado hasta la extension de los limites por et juez designado," meaning "approved to the extent of the limits designated by the judge." These are, however, merely speculative ideas—guesswork. But there can be no guesswork as to the fact that the grant was returned to the governor and was in his possession and endorsed by him This establishes it as having been in control of the government, and it afterwards being in the iron box of Baca, and coming from the possession of his heirs, it can be accounted for on no other reasonable hypothesis than that it was given to Baca as the evidence or testimonial of his title.

It has been shown by the evidence of Key, pp. 51 and 52, that there was no regularity in the practice of making grants. Sometimes the original was given to the party and a copy kept; sometimes a record was made and the original given, and sometimes a copy was given and the original kept.

The government has waited nearly fifty years before allowing the claimants to commence this action. In the meantime all the persons who would have knowledge of the facts of this grant, and the mode in which the evidence of title was given, have died. The archives in 1837, after Baca's death, were partly destroyed, and again in 1870 destroyed, sold or lost (see stipulation p. 101.)

Can the government, for such long time being guilty of laches in carrying out its treaty stipulations, be heard to raise objections to a custom or a title which is admitted to be original and coming from proper hands, after fifty years of possession, and the witnesses all dead? It would be against good conscience to do so. Long lapse of time compels the adoption of the best evidence which can be obtained. While grants must be construed strongest against the grantee, yet the rule as to proofs and laches are construed against the party at fault. Here Baca took possession, complied literally with the terms of the grant, held it up to the time of his death, and his widow and executrix held it after him, and some of his descendants remained in possession until very lately. His acts, and the facts which are undisputed showing a claim to the property by him and his heirs and a long possession inconsistent with the claims of the government, establish conclusively that the grant was made, and the grant papers delivered to Baca by the Governor.

But it was not the grant or the acts of the judge which were to be approved: it was only the "expediente." The grant was perfect, not "incipient" as claimed. There is nothing which implies that the expediente was not to be given out. The "proper testimonio" it was said would be given What is the "proper testimonio?" It has been shown it was sometimes the expediente, sometimes the copy. Why was not the expediente a "proper testimonio?" A record could have been made, a copy could have been kept, or even no record or copy. There is

no proof or law before the court showing that there was any requirement prior to 1824, under the Mexican colonization laws that the originals of a grant should be kept in the archives, nor that there was such custom. Mr. Keys' evidence, pp. 51-52, which is uncontradicted, shows there was no uniform practice; sometimes one, sometimes another practice prevailed. Sometimes no copy was kept or found, nor any record.

It would seem the government ought to have kept something to show that the land had been granted, and doubtless did, but the destruction of a part of the records in 1837, and the sale and loss of others in 1870 71 (see p. 101) accounts for the same not being found. This was so decided in this court in the case of U. S. vs. Chaves, 159 U. S.

The Governor did not say a testimonio should be given. He said "so that if approved a '*proper* testimonio, &c. be given." What is the "proper testimonio?" Who was to be the judge of what was proper? Surely the Governor; he was the sole authority and his acts are conclusive and binding, unless it can be shown that there was a law requiring something else, absolutely.

It is surmised by the U. S. Attorney that the original papers were given to Baca to take to the Comandante General and get his approval. This is not probable or supposable. The Governor would have transmitted the paper with his recommendations if that had been required. Under the Ordinanzas de Intendentes the powers of the Governor of New Mexico remained the same as under the law of 1754; they were not changed in the least. The Comandante General was a species of viceroy representing the King, with the powers of the King; he took no authority away from the Governor—only had a superintending control such as the viceroy in Mexico before him, or the King himself. The fact is that in a majority of the grants in New Mexico the original

expediente was given out. It is rare that the original, or a record of one was found in the archives, except those of very early date. The Mexican Congress and regulations in 1824 and 1828 provided for a record to be kept, but nowhere under Spanish law was one provided for, nor was the practice ever established that it was absolutely required. Every case of rejection of a grant for want of record is under the *Mexican law* where a record was expressly required.

The Camandante General had no express power to make grants, or to revise everything the Governor did, except on appeal or objections made to him. His power, like the viceroy's was supervisory only. On appeals to him he could correct errors and irregularities and want of authority. No power was conferred upon him to make grants; that power was conferred on the Governors of New Mexico expressly, and was never modified or taken away from them. The Comandante could make rules and regulations modifying or changing the existing laws, but if he did not, the laws remained. He could direct grants to be made, and where the public use or service was involved, he could possibly revoke, but until appealed to, the regulations and practice continued uniform. If it is sought to extinguish the authority of the Governor, he who contends for it must show the law or authority for it. None has been shown or can be shown. It does not exist. The Governor of New Mexico never was under any regulations as to making grants other than the law of 1754, until changed in 1824. This authority was universally exercised and acquiesced in (see stipulation record, pp. 101-2), which shows a number of grants made by Melgares, some confirmed by Congress direct, some by the Court of Private Land Claims and acquiesced in, and others pending. The records are full of grants made by Spanish Governors and are held to be perfect. Because the Comandante had a supervisory power over the Governors, it

did not imply that every act of the Governor should be submitted to him before it became binding or final. In the absence of the exercise of the supervisory power by the Camandante, or any regulations for its exercise, we must assume the action of the Governor was unquestioned by him.

"The confirmation of similar grants made by acts of Congress or Boards of Commissioners acting under their authority, are also powerful evidence of the lawful exercise of the authority by these officers; and being proceedings under the treaties and laws, they are made a rule by which, among others, we may adjudicate on the claims of the present parties (Mitchell v. U. S., 9 Pet., 741.) It will be seen that several of the grants stipulated to have been made by Melgares have been confirmed by Congress Several others have been confirmed by the court of Private Land Claims

The claimants in this case purchased the lands in question on the faith of the action of Congress in confirming other grants. They have a right to rely upon that action in similar cases as being a rule of property wherein Congress held that this same officer had a right to make the grants. Is not the United States estopped by such action? The various cases cited as being cases wherein the Comandante General interposed in matters of grants are each special in themselves and only show the exercise of a certain superintending control, and do not show that any rule or regulation existed whereby that control or exercise of authority was to be invoked. On the contrary, each particular case is controlled by the special circumstances surrounding it and governing it.

Citation is made of the action in the grant made by Manrique. In that case it was proven, and the court so held, that the pretented action of Manrique was a forgery and the grant was rejected for that reason. It is contended that Melgares never went beyond an incipient grant—that the title was

only inchoate an equitable The Governor of New Mexico, and all other Governors, were the direct representatives of the crown. In U. S. v. Clark, 16 Pet., 228, it is said, Spain had power to make grants in any way and on any conditions, and when they were binding on that government, they were binding on ours.

This grant was made in 1819. Within two years thereafter the sovereignty of the country changed and a legal Empire took the place of the Spanish authority, and in a few months thereafter, a Republic took the place of the Empire. But it is insisted that there was no incipient character to this grant. The Governor distinctly says, "As he asks it according to law," meaning thereby *granted* as he asks it according to law. There is no condition at all to that grant. The grantee could not be held responsible for the proper performance on the part of the judge of his duties: it was the duty of the officers of the government to act properly. Neither could the grantee compel the Governor to give him a particular kind of paper as evidence of title. The grant in this case is admitted to be genuine. It is admitted that it came from the hands of Bartolome Baca. It is admitted that Baca was placed in possession, and conclusively proven that he remained in possession for at least thirteen years after the change of sovereignty in the country. It is admitted that his wife took possession immediately after his death, and that his grandchildren were upon the property in 1841, and that all the time it was acknowledged and respected as his property. These facts are clearly proven, unquestioned and uncontradicted. No grant can be considered incipient or inchoate which is absolute in its character, made by a party authorized to make an absolute grant, and given without conditions, or if given with conditions subsequent, and these conditions performed. The contention of the government that this grant was inchoate is rather shallow.

It is contended that Melgares looked to the Comandante General as the official authority to make the grant requested, and that he referred Baca to that official instead of assuming to make the grant himself. Where is the proof of such fact? There is not a hint throughout the entire grant that Melgares questioned his own authority. If he had authority he certainly exercised it when he made an unqualified, unquestioned grant The United States Attorney contends that the grant, as made, was only permissive. How the language of this grant can be construed into permissiveness, is hard to see. There is not a single thing either in the grant or in the act of juridical possession, or in the petition for the grant, which intimates that Baca only asked permission, or that the Governor only gave permission, or that the judge only gave a permissive possession which might be vacated. If such were the case, the long continuance of Baca in the possession, with his heirs, according to the decision in U. S vs. Chaves, 159 U. S., p. would establish a presumption that the grant which was made had been approved by the higher authority, if one was required to approve it. If in a case like that of the U. S. vs. Chaves, without any proof whatever (as in that case) that there had been any record in the archives at Santa Fe, either by way of an original or a copy or a register of that grant, or that it had been returned to the Governor, it can be assumed that a grant was made because the parties had been in possession since 1835, for a period of about 50 years, only a 11 years of that time being under the Mexican government, and that under a grant claimed to be made under Mexican authority where the law expressly required a record of the grant (more than was required under the Spanish law) then much more will a grant be presumed where the parties have been in possession 40 years—twice the length of time the court says was required in that case, and more than 20 years of that time under Spanish and Mexican

rule before this country acquired the property and established a different system of land titles.

If the Chaves case, above cited, was good law, certainly the principles of that case are applicable to this one, so far as the presumption of a grant is concerned. So that if in any event it can be claimed that the authority of the Comandante General was to be invoked, we have the presumption that it was invoked by the operation of the rule of prescription

But we contend that the endorsement of Melgares, at the bottom, is evidence that the title in this case was returned and became a public document, which the Governor could deliver out to the grantee if he saw proper. It was under his control. It was the "proper testimonio." While it was not a strict technical testimonio in the literal definition of the word 'testimonio," it was what the Governor spoke about as a "*proper* testimonio," being such a testimonio as he qualified by the word "proper," and what he meant by the word "proper" was what he should determine to be proper

There is no instance of record, or known amongst any of the papers, where after a judge had given possession of a tract of land, he delivered the original papers to the claimant to be returned to the Governor. Frequently he delivered the original papers to be kept by the party as evidence of title, and when original papers were returned to the Governor, they were required to be submitted to no other authority. The Supreme Court has stated that when required under Mexican law it was the duty of the Governor to submit them, and that the claimant was under no obligation to look after them further. But this applies solely to Mexican grants and not to Spanish, as there never was a case where it was held that the Governor was required to submit his action to any higher authority by operation of any established regulation or law, and wherever he did so it was his own voluntary action or by virtue of a direct order

from the higher authority, and only in the particular case in which it was done, without reference to any rule or regulation whatever.

It is submitted that a perfect title given to a party, even though there be no record or memorandum of it in the archives, is good when accompanied with clear and notorious acts of possession and user in the mode required, as is given in this case. The authorities all state such to be the case, and it has been permitted in many instances where there is no evidence of a record of a grant, and no evidence of the existence of a grant, except parol evidence to prove the grant when a notorious and continuous possession has been shown for a considerable time. It is insisted that the government has not shown that Baca could not have possession of the original papers unless for the purpose of transmitting them to the Comandante: That is a mere suggestion and surmise without any proof of any law or custom to support it.

Grants have been confirmed which were made verbally, and open, notorious possession and proof of the verbal grants have sustained them. It is possible that the original grant in this case was delivered to Bartolomo Baca, to be by him carried to the judge, Mora, in order that possession might be delivered. That was evidently the custom, but as the grant itself designated who should give the possession, and what the officer should do after he gave possession, and as the officer himself says that he individually returned the grant to the Governor in order that he might do what was right and just in the matter, it cannot be questioned that the grant was returned to the Governor and was in the possession of the Governor. Being once shown to be in the possession of the Governor, as a grant, and afterwards in the possession of the grantee, it seems that the record is thoroughly established,—that is, of the existence of the grant in the hands of the authorities at one time, and that

existence is proven by the endorsement of Melgares at the foot of the action of the judge, and by the certificate of the judge himself that he actually returned it.

There is no law pointed out in any manner that shows that a Governor of a Territory, under Spanish authority, had the power to make inchoate or incipient grants. The custom which they exercised from 1754 down to the independence of Mexico was to make grants absolute. They had no authority to proceed otherwise than to make a perfect grant, except where they granted a given amount in a larger tract, or attached conditions to be performed before the grant took effect, and certainly Melgares in this case undertook to make a full, complete and perfect grant, it was granted for a "*permanent ranch or hacienda*," and not to give permission, or to grant on condition of approval of any superior authority. The only approval that he provided for, was that the expediente should be returned to him so that it might be approved. That must be as to its form or as to what was really done, if anything was done. But if the action of the judge upon its face shows that it was in strict accordance with the directions of the Governor, and was afterwards received by the Governor, and there was nothing in conflict with the authority given by the Governor, certainly it can not be presumed when it was indorsed in some manner and re-delivered as title to the grantee, who took possession of the land held and claimed it for 16 years and whose heirs afterwards continued in possession and claimed it for 20 years or more thereafter, that such was not a full and complete grant. There is no equity in this case; there is a full and complete legal title, in our judgment. And as the Governor had full power to make grants of unlimited quantities, we insist that the grant in this case must be confirmed to the extent of the *limits designated* by the judge who was authorized to designate them as the limits of the tract called Torreon.

Why should Bartolome Baca have transmitted the original grant to the Comandante General? There is nothing directing it to be done. There was no regulation providing for such procedure. The Governor's grant was final in itself. The judge's possession was complete and conclusive. The only question was whether the expediente was in proper form and according to the usual and ordinary practice and custom so as to be approved. There was no provision in the grant that Bartolome Baca should inhabit the property, nor was there any provision that he should construct reservoirs. The only provision was that he should, by his intelligence, increase the limited waters which have been donated to him in order that his herds may be maintained. It is true he suggested that, if possible, he would open lands for cultivation, and suggested that he proposed to improve the waters, if possible, with reservoirs and other appliances which could secure every possible advantage. It has been shown that he constructed ditches; that he had ample water for his stock to the extent of 75,000 sheep, 300 horses and 900 head of cattle; that he had about thirty servants on the property, together with his two sons; that he broke up and cultivated fields and lands and planted gardens. He certainly did everything that the spirit of his contract required him to do. The fact that he remained there so long, even until his death, and no question whatever was raised: that his heirs continued there after his death, and no question was raised until this suit, is sufficient to justify any court under the sun in holding that there were no conditions in that grant which were not performed.

As stated by counsel in quoting from U. S. vs Kingsley, 12 Pet., 476, as to what the court will do It says: It will, as it has done, *liberally construe the performance of conditions precedent or subsequent* in such grants, and *will not apply the rules of com-*

mon law. But it says that it will not say that a condition wholly unperformed, without sufficient cause to prevent it, does not defeat all rights of property in land. But there is no pretense in our case that the condition was wholly unperformed, as in the Florida case. The contention is that the condition was wholly performed, as is apparent from the testimony in this case, and by a liberal construction there can be no question about the performance The case cited from Florida certainly does not strengthen the government's case.

It must be remembered, too, that in considering the grant made, that it was made in very troublous times, during the pendency of the Mexican revolution, when it would not be presumed that a grant made by the Governor in a remote province, would, in any sense of the word, be referred to the Comandante General, who was a military officer in charge of the armies of the government at that time fighting to suppress the revolution. There is not an instance where, during the continuance of that revolution, the Comandante General ever undertook to exercise any authority in reference to a grant. He was in the field, probably remote from the capital of New Mexico, as the seat of war in Mexico was at least a thousand miles from Santa Fe, and travel at that time dangerous on account of the boldness of the savages, which had been encouraged by the existence of war in Mexico, as also danger from the revolutionists, who opposed the acts of a Spanish Governor. There is no reason to suppose that the grant would have been referred under such circumstances.

It has been claimed that Baca's title had not been recognized by the Governor, and the Manzano grant, made in 1829, has been cited in one instance. But the proofs show that the Manzana grant lies entirely without the limits of the grant in question. The curved line the U. S. Attorney referred to in his argument is a line made by the judge who delivered possession,

and follows exactly the position he gave on the south from the Ojo del Cuervo to the Ojo del Chico, so that that grant cannot be considered in any way; but if it could, the proofs show conclusively that Baca ceded all of his rights in that grant to the people of Manzano.

The only other grant which it is claimed was made in this property during the lifetime of Baca, is one that never had any legal or equitable existence. It is a grant applied for by Nerio Montoya to the Ayuntamiento, or town council of Tome That council referred it to the Territorial Deputation, which undertook to make the grant without consulting the Governor.

The Supreme Court of the United States in Vigil vs. U. S., 6 Wal., p. and in other cases, has distinctly held that the Territorial Deputation had no authority to make grants. It might be, that, Baca having invited the people who settled at Torreon to make that settlement so that it would help protect him against the Indians, as the evidence shows, they thought that they could obtain some kind of confirmation of the title which Baca offered them, and for that reason they applied to the Territorial Deputation. It was well known that the Territorial Deputation had no authority to make grants, much less to invade another man's property; and these parties having entered that property, as shown conclusively, at the invitation of Baca, and he having agreed with them to their possessions, there can be no pretense that a void grant made by the Territorial Deputation, without authority, was an assumption of legal control by the proper authorities over the land in question. In the case of Hornsby vs. U. S., 10 Wal., 240, the Supreme Court of the United States held that some formal and regular proceedings were required to effect a divestiture of title, such as under the Mexican law by what is termed a "denouncement" by a party desirious to obtain the land; an investigation then followed whether or not the conditions had been complied with,

or disregarded so as to justify decree; that without such inquisition and decree the title did not revert to the Government, nor was the land subject to be re-granted. It is insisted that there is no decision that conflicts with that decision. There is no case where the Government has ever entered upon lands which had been granted, without the denouncement proceedings. But where parties had not entered upon lands granted upon conditions, and had failed to perform the conditions within the time required, or in the terms required—in fact had absolutely neglected to comply with the intent and purpose of the law, the grant, not being an absolute or perfect grant, then the Government could resume possession without forfeiture, because the land was abandoned and not subject to the proceedings of forfeiture. Land can be abandoned only before the title has vested if after the title is vested an abandonment is claimed, a reconveyance or some affirmative act must be shown. The Spanish law in that respect did not differ from ours, or the common law. The cases cited by the United States refer to just such grants as that, and the contention of the United States in this case is that our grant was such a grant. But how it can be so, it is impossible to determine But if it were such a grant, there is no pretense that there was an abandonment. If it was abandoned, when did the abandonment take place? Certainly not in 1829 when Baca had full possession, nor in 1831 at the time Nerio Montoya was invited to come in and did come in when Baca still had full possession and gave his consent. If that had been a perfect grant made by the Governor and Departmental Assembly to Montoya, it would have had no validity without the consent of Baca, who had the full and complete possession.

The other grants were made long after Baca's death, and only one of them had any of the legal requisites required That

of Sandoval, which was made after war was declared between Mexico and the United States. Without doubt there was no careful inquiry as to the fact of a prior grant. Sandoval was a rich and powerful man, and they feared the occupation by the United States. It is admitted two other grants had been previously made to him—they contained more than eleven leagues —so this one was void for that raason also.

In the U. S. vs. Peralto, 19 Howard, 680, the Court say the presumption arising from the grant makes it prima facie evidence of the powers of the officer asking it and throws the burden of proof on the party denying it. See cases cited in claimant's brief, pp. 9 and 10, by Catron and O'Bryan.

If the law required confirmation it required it of the Governor only, and the delivery of the title papers by the Governor with the possession is sufficient evidence of confirmation.

When a grant was revoked or disapproved by a Governor, which was rare, it required the party to deliver up possession, pull down his houses, and remove them and take away his effects and chattels. Here the opposite was done, so the presumption is with the apparent good faith of Baca.

The Act of 1754 never required confirmation of the acts of the Governors of New Mexico, which was a "remote province."

Justice White's opinion in the Santa Fe case is invoked, but the law he refers to only applies to *towns* and *villages*, not to individual grants of large tracts of land outside of a town or village.

There is no law requiring a confirmation by a superior authority, the Governor of New Mexico was his own *superior* in that regard. New Mexico was a remote province and excepted from the approval of the Audiencia or Council.

There is nothing in the position that Melgares was only acting Governor; he is so designated in the petition for the grant, but he waited nearly five months before making the

grant, and continued as Governor for two or three years thereafter, and the judge who gave possession designated him as Governor in his return and not acting Governor; but if he was acting he was *defacto* and possessed all the powers as such of a fully authorized Governor, and his acts are equally binding as a de jure Governor.

It is claimed the papers shows the missing part was cut off. It does not do so; examine it and it will be seen it was folded over a line made by a lead of a printing press which partially cut it, and that it broke practically clean when it was doubled at the place from which the part is missing and above the *cross break* it is equally clean of rough edge, showing if cut below it was cut where it is accounted for as being in Baca's box and when found the piece was missing. Why did Baca have it? Only as evidence of title, for sixteen years he claimed title under it and his heirs after that for twenty years more. Is not this an explanation?

The Cedula of 1805 only granted the additional power, of right to sell lands and required the sale should be approved, but did not take away the power to grant, or require them to be approved. This Court has too often held the right to grant existed in Spanish Governors to now deny that right to a bona fide purchaser—See U. S. vs. Peralton, 19 Howard, 680 and cases cited, pp. 9 and 10, Catron and O'Bryan's brief.

Assuming that the alleged grants pretended to have been made within the limits of the grant to Baca were an assertion of authority by the Government, they would not extend beyond their own boundaries and affect other parts not embraced in them—and to affect at all they must be legal; not one of them was legal as is shown in the former brief. U. S. Attorney claims the improvements were at Torreon only, but the witnesses say there were two ranches, one at Estancia Springs and the other at Torreon. The stock was kept at Es-

tancia quite distant, and there must have been improvements there.

The U. S. Attorney dwells on the fact that in the Bracito tract Alencaster refused the grant first; that on application to Melgares he expressed doubt if he had as much power as Alencaster. This is easily explained. That tract of land was only about thirty miles north of Paso del Norte now Juarez, Mexico. There was a doubt about whether New Mexico covered that country. The Commandant General had appointed a Lieutenant Governor there, and it was doubted who had the authority so it was referred to the Commandant for decision in the exercise of his superintendency power, and he directed the matter to be presented to the Lieutenant-Governor at Paso del Norte, but did not pretend to make the grant or claim the right to revise or control it; that grant made by the Lieutenant-Governor at El Paso without approval was recognized as valid by Congress, and confirmed to Hugh Stevenson by the Act of June 21, 1860.

That case being called to the attention of the Commandant shows he did not exercise or claim the right of approval but he had the supervisory power where there was a doubt as to who had the right or power to make the grant, to designate the proper party to make it.

J. D. O'BRYAN
T. B. CATRON
Attorneys for Petitioner.